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Congress of the United States
House of Representatives
Washington, DC 20515–2107

April 26, 2002

The Honorable Harvey Pitt
Chairman
Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20545

Dear Mr. Chairman:

The loss of billions of dollars in employee retirement benefits and shareholder equity as a result of the bankruptcy of the Enron Corporation has focused public attention on certain forward-looking statements made by senior Enron executives prior to its bankruptcy filing which appear to have been false or misleading or to have contained material omissions.

As you know, Section 102 of Public Law 104-67, the Private Securities Litigation Reform Act of 1995 (PSLRA), created a "safe harbor" for forward-looking statements that meet certain specified criteria. This legislation, which was enacted as part of the Republican "Contract with America" over President Clinton's veto, appears to have made it easier for executives at Enron and other public companies to engage in puffery and possibly even to mislead investors about a company's future prospects and earnings. While I understand that it would be inappropriate for the Commission to comment at this time on any specific forward-looking statements at issue in the pending Enron litigation, I am trying to better understand the impact of this particular provision of the 1995 Act on corporate disclosures generally. In this regard, I request the Commission's assistance in providing responses to the following questions relating to the parameters of safe harbor protections provided for forward-looking statements under the PSLRA:

1. During Senate Floor consideration of S. 240, the Senate version of the PSLRA, Senator Paul Sarbanes offered an amendment to close the bill's safe harbor to forward-looking statements made with "actual knowledge" that they are false or misleading, even in circumstances where meaningful cautionary language is present. As you know, the Sarbanes amendment failed, and the statement of managers that accompanied the PSLRA conference report stated, in relevant part: "The applicability of the safe harbor provisions . . . shall be based on the sufficiency of the cautionary language under these provisions *and does not depend on the state of mind of the defendant"* (emphasis added).

   While the statement of managers calls for consideration of the defendant's state of mind in another subsection of the safe harbor provision, the statutory language employs an alternative, rather than conjunctive, construction. As a result, the PSLRA appears to have established a three-part test for safe harbor protection that shields forward-looking statements that are *either*:

- accompanied by meaningful cautionary language; *or*
- immaterial; *or*
- issued without actual knowledge of the statement's false or misleading nature.

The "either/or" format of the provision has encouraged some leading securities industry practitioners to assert that the parameters of the PSLRA's safe harbor cover forward-looking statements if any one of these three conditions is satisfied. In some cases, the courts have agreed, granting safe harbor protection in fraud cases regardless of the defendant's state of mind, as long as meaningful cautionary language is present, for example.[1] In other cases, courts have found that the mere presence of cautionary language is insufficient to trigger safe harbor protection, particularly when accompanying language is vague or generic.[2]

A.) In the Commission's opinion, does satisfaction of any one of these three statutory conditions confer safe harbor protection upon a forward-looking statement?
B.) If yes, does the Commission consider judicial rulings that deny safe harbor protection to a forward-looking statement despite presence of a cautionary statement to be inconsistent with the PSLRA's safe harbor protection?
C.) If the Commission does not view satisfaction of merely one of the three statutory conditions as sufficient to qualify for refuge within the safe harbor, under what condition(s) do forward-looking statements qualify for safe harbor treatment?
D.) In the Commission's view, if a defendant has actual knowledge that a forward-looking statement is false or misleading or contains a material omission, would the forward-looking statement be denied safe harbor protection, even if meaningful cautionary language were present?

2. Given conflicting judicial precedent and the importance of accurate, informative forward-looking statements to corporations and investors alike, has the Commission developed any guidelines, no-action letters, orders, or rules to provide insight into the parameters of the safe harbor? If yes, please provide a copy. If no, does the Commission plan to craft such guidance? If not, why not?

3. According to proponents of the PSLRA, the purpose of the safe harbor was to increase the quantity and quality of forward-looking statements.

A.) Does the Commission believe that this objective has been achieved, or that issuers have instead merely been given additional latitude to make potentially false or misleading statements?
B.) If the Commission believes the PSLRA's safe harbor provision has increased the quantity and quality of forward-looking statements, on what basis does the Commission make this determination?
C.) Is the Commission at all concerned that the safe harbor may encourage issuers to engage in overly optimistic puffery, make misleading or false statements, or to otherwise deceive investors?
D.) How many enforcement actions has the Commission brought in which defendants have cited the safe harbor in their defense? Please provide citations

[1] Harris v. Ivax Corp., No. 98-4818 (July 27, 1999).
[2] Boeing Securities Litigation, 40 F. Supp.2d at 1167-69.

for each case in which this has occurred. How have the courts ruled in each of these matters?

E.) If the Commission is concerned that the safe harbor may encourage issuers to make false or misleading statements that could potentially deceive investors, what legislative or other remedies would the Commission suggest to protect investors from such deception?

4. Issuance of forward-looking statements during telephone conference calls with securities analysts has become a popular means to disseminate projections about companies' future performance. In fact, Enron executives reportedly used analyst calls and similar fora to release overly optimistic information about the firm's financial health and future prospects.

   A.) Does the Commission evaluate corporate compliance with PSLRA requirements concerning oral forward-looking statements (i.e., the oral forward-looking statement is identified as such and is accompanied by a meaningful cautionary statement, etc.?)

   B.) If the Commission does assess compliance in this area, over the past twelve months, how many firms has the Commission reviewed for compliance with PSLRA requirements regarding forward-looking statements?

   C.) How many of these firms were found to be in compliance?

   D.) How many failed to comply?

   E.) What actions did the Commission take in instances where the firm's behavior was not in compliance with PSLRA requirements? If the Commission took no action, why not?

5. As you know, the PSLRA's safe harbor provision requires that forward-looking statements be accompanied by meaningful cautionary language.

   A.) In the Commission's view, what constitutes "meaningful cautionary language"?

   B.) How often has the Commission staff sought changes in corporate filings to ensure that any forward-looking statements made in these filings contained meaningful cautionary language?

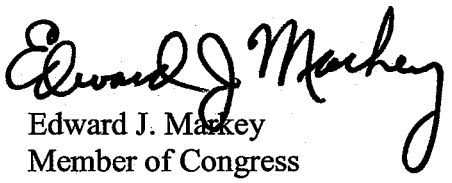
   C.) In light of inconsistent court rulings on the interpretation of the term "meaningful" as it relates to forward-looking statements, what legislative, regulatory or other actions does the Commission recommend to clarify the meaningfulness definition?[3]

   D.) If the Commission recommends no further action, how does the Commission suggest that issuers and investors determine when a cautionary statement is sufficiently meaningful to be protected within the safe harbor?

[3] In Kensington Capital Management v. Oakley, Inc., warnings in the prospectus about potential product delays due to design issues were ruled too generic and insufficiently meaningful to qualify for safe harbor protection. In Ehlert, 245 F.3d at 1313, the Court ruled that cautionary language about Year 2000 compliance of a particular software product was specific enough to be considered meaningful.

I appreciate the Commission's responses to these questions. Please submit a reply within 15 workdays, or no later than May 17, 2002. Should you have any questions, please have a member of your staff contact Mr. Jeff Duncan or Mr. Mark Bayer of my staff at 202-225-2836.

Sincerely,



Edward J. Markey
Member of Congress